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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 183

HOLLOWAY GRAVEL COMPANY, INC.,
Petitioner,

versus

WILLIAM R. McCOMB, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ALLAN SHOLARS,
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ALLEN B. GUTHRIE,
Of Counsel.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

The petition of Holloway Gravel Company, Inc., with respect, represents:

That a writ of certiorari should issue to review a judgment of the United States Court of Appeals for the Fifth Circuit, in this cause, for the reasons shown herein.

STATEMENT OF THE MATTER INVOLVED

This cause was instituted against petitioner, a Louisiana corporation, by William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor, in the District Court of the United States for the Eastern District of Louisiana, praying for the enforcement of a subpoena duces tecum, issued by him, requiring petitioner to produce for inspection by representatives of the Administrator, "at the office of the Postmaster, United States Post Office Building, in the City of Hammond, Louisiana," on June 3, 1948, all of its books and records "showing the hours worked by and wages paid to" each of petitioner's employees between October 27, 1945, and the date of the subpoena duces tecum, May 13, 1948. Authority for issuance of the subpoena was asserted under the provisions of Section 9 of the *Fair Labor Standards Act of 1938* (52 Stat. 1060; 29 U. S. C. 201, et seq.)

The relevant facts, briefly stated, are that when William O. Futch, Inspector of the Wage and Hour Division, called at the office of petitioner, at Roseland, Louisiana, on October 20, 1947, he advised that the purpose of his visit was to make an inspection (1) to determine whether Holloway Gravel Company, Inc., was covered by the law and (2) to determine whether the company was complying with its provisions, and for that dual purpose he would need to examine (1) such books and records as reflected interstate commerce activities of the company and (2) its payroll and time card records. Whereupon, petitioner's President, H. H. Holloway, tendered for inspection and examination all records called for in the first classification, reflecting evidence of the several activities

of the company and including all production, sales and shipping records, which were inspected and examined by Mr. Futch and from which copies and notes were taken by him. He was also assured that such records would be available for further inspection at any convenient time and that, upon request, any information respecting those records or activities of the company reflected thereby would be furnished. Inspection of the payroll records, however, was denied him for the reason stated that the sand and gravel industry is not subject to the *Fair Labor Standards Act*, that neither Holloway Gravel Company, Inc., nor any of its employees were engaged in interstate commerce or in the production of sand and gravel for interstate commerce, but solely in the production of sand and gravel for intrastate delivery, use and consumption, and that provisions of the *Wages and Hours Law* were not applicable to said company and its employees and it was not therefore, required to operate in compliance therewith, all as was evidenced by the books and records already examined by Mr. Futch.

The records examined disclosed that an approximate seventy to eighty percent of all sand and gravel produced by petitioner is sold to purchasers who make use thereof in constructing, repairing and making additions to railroads and highways in the State of Louisiana, sales to the railroads being invariably made under the express condition that the same is for use in Louisiana only. Further, in this connection, petitioner asserted that every effort was made to restrict its business to sales of sand and gravel for use and consumption wholly within the State of Louisiana where it is produced and that no sales

and shipments whatever have been knowingly made for use without that State, and, in fact, sales and quotations for shipments which were known to be for interstate movement have been always and repeatedly refused. (R. 8-11; 23-26).

Following this inspection and examination, petitioner was advised, through its attorney, Allan Sholars, by the Administrator, through his Regional Attorney, Earl Street, by letter dated January 29, 1948, that (R. 27):

> "You have, in effect, requested that *the Division submit to you adequate authority for its position* before you will advise your client to acquiesce to the inspection. For this reason the matter has been referred to us.
>
> "Our perusal of the file indicates that the subject company is engaged in the production of sand and gravel, *all of which is sold intrastate.*" (Emphasis ours).

Continuing on page 28 of the Record:

> "*It is the position of the Division* that the production of goods in order to supply the needs of interstate commerce, or to serve as an essential part of such commerce, or to aid or facilitate the carrying on of interstate commerce by essential instrumentalities or facilities of commerce * * * is production for commerce." (Emphasis ours).

And, p. 32, Mr. Street advised that the Administrator's actions in the premises would be upon "a recommendation on the part of this office."

It was also pointed out that a small quantity of sand sold to the Mississippi Valley Silica Company had been used by it in the manufacture of products sold in interstate commerce (R. 29). No official, employee or representative of petitioner knew, however, prior to receipt of this letter, that the sand so sold was used or intended to be used for production of goods to be shipped in interstate commerce; the last sale to Mississippi Valley Silica Company was made May 10, 1947, more than a year prior to commencement of this action. President Holloway swears that no further sales would be made to it (R. 25).

The Administrator's allegation in paragraph 3 of his application (R. 3) that "upon information and belief respondent (petitioner herein) is engaged in the production of sand and gravel for interstate commerce" was denied, with the averment by the respondent in its answer (R. 16, par. III) "that complainant has no information, or any grounds whatsoever on which to base his alleged belief that respondent is engaged in interstate commerce," which was reiterated in other parts of the answer, appearing at pages 16 and 19 of the Record.

In further answer to the rule issued by the District Court, petitioner denied that it was subject to the *Act*, which issue, pitched by the pleadings and exhibits filed, was not disposed of by the District Court or by the Court of Appeals; petitioner also resisted compliance with the Administrator's subpoena for the reason that it ordered production of records for a period exceeding the time during which employers subject to the Act are required to retain such records under the Administrator's regula-

tions, setting up that the Administrator's action in issuing the subpoena duces tecum was oppressive and arbitrary. (R. 20).

It is petitioner's contention that, having submitted to an examination of all of its records with reference to production and distribution of its products, which disclosed that it is engaged in "the production of sand and gravel, all of which is sold intrastate," and therefore not within the provisions of said *Act*, petitioner should not be subjected, at great inconvenience, to the further visitorial and inquisitorial activities of the Administrator, at his whim and caprice, which can throw no added light upon the question whether or not petitioner is subject to the *Fair Labor Standards Act;* that the District Judge, in issuing an order directing petitioner to comply with the Administrator's subpoena duces tecum (R. 33-35) abused, or refused to exercise, the discretion confided in him by failing and refusing to consider and pass upon the issue pitched for his determination, whether or not petitioner is subject to the *Act*, under the undisputed record facts and the Division's somewhat strained interpretation of the statutory provisions, and that the Court of Appeals erred in affirming that order without consideration or disposition of the matter presented to it by petitioner's appeal.

JURISDICTION.

Review is sought under the provisions of *United States Code*, Tit. 28 (New), Sec. 1254, approved June 25, 1948. (62 Stat. 992), providing that cases in the Courts of Appeals may be reviewed by this Court by writ of certiorari granted upon the petition.

The judgment of the Court of Appeals was rendered May 19, 1949. (R. 43). Rehearing was applied for June 8, 1949, and denied by the Court of Appeals June 10, 1949. (R. 53). See ..... Fed. (2d) page .....

QUESTIONS PRESENTED.

1. Has the Court of Appeals decided, in effect, an important question of Federal law which has not been, but should be, settled by this Court, the question being: Is petitioner subject, as an employer of labor, to the further investigatory powers of the Administrator of the Wage and Hour Division for the purpose of ascertaining violations of the *Fair Labor Standards Act, vel non*, after an examination and investigation of the employer's books and records, pertinent to coverage by the *Act* of its operations, disclosed that it "is engaged in the production of sand and gravel, all of which is sold intrastate," and therefore not covered by the *Act?*

2. Has the Court of Appeals denied to petitioner a substantial right in affirming the compliance order of the District Court, which had abused, or failed to exercise, its discretion with respect thereto in failing and refusing to consider and pass upon the issue presented by allegations of the Administrator's bill and petitioner's answer thereto, the affidavits and exhibits filed, relating to the asserted claim that petitioner is engaged in the production of sand and gravel for interstate commerce, by itself failing and refusing to consider and pass upon the issue herein pitched in its opinion and decision, wherein the question could and should have been determined, said Court of Appeals having declined to hold in its opinion (R. 43) that there was any

settled and established rule whereby "the question of coverage could not be determined on application for a subpoena duces tecum"?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Question No. 1.

Extended and diligent research by petitioner's counsel has failed to disclose that this Court has passed upon the issue here involved. The point has not been raised in any reported case.

Petitioner shows that its entire production of sand and gravel is sold to purchasers in the State of Louisiana, and no sales or shipments whatever have knowingly been made by it for use without the State, all as shown by uncontroverted facts in the Record herein.

Petitioner and its employees are not engaged in interstate commerce or production of goods for such commerce, as was disclosed by the examination made. The theory and statutory construction of the Administrator, set forth in letter of his Regional Attorney (R. 27-32), respecting sales of sand and gravel for use by the purchasers thereof on highways, railroads and other instrumentalities within the State of Louisiana, are fully met and answered in *E. C. Schroeder Co. v. Clifton* (10 C. C. A.) 153 F. (2d) 385, (cert. den., 328 U. S., 858) wherein it was said and held at page 390:

> "Off-the-railroad and off-the-highway employees, working at a remote point in the mining, production, and processing of gravel cushion and riprap for use in the construction of relocated portions of

> the railroad and the highway, are not engaged in the movement of commerce or so closely related to it as to be for all practical purposes a part of it, within the meaning of the Act."

And in *McLeod v. Threlkeld*, 319 U. S. 491, 497:

> "The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it."

Petitioner further shows that, with respect to the small amount of sand sold to Mississippi Valley Silica Company which was used by it in the manufacture of another product sold in interstate commerce, petitioner's president, H. H. Holloway, swore that neither he nor any employee or representative of petitioner knew that the sand was to be so used and was intended for interstate shipment, that no sale had been made subsequent to May 10, 1947, and no further sales to the Silica Company would be made (R. 25) and that Section 15 imposes the penalties provided by the *Act* only upon those who sell, transport, etc., "*with knowledge* that shipment or delivery or sale thereof in commerce *is intended*, any goods," etc. (Emphasis ours). "To constitute production for commerce, an employer must have some intent or expectation that his merchandise, or some percentage of it, will normally enter the channels of commerce." *Urban v. Victory Naval Uniform Co.*, (D. C. Mass.) 71 F. Supp. 270, 271. Cf. *Enterprise Box Co. v. Fleming*, 125 F. (2d) 897, 899.

Petitioner shows that, for the *Act* to be applicable, employer and employee must be engaged in interstate commerce. 29 U. S. C. 202, 203, 206, 207, 211. An employer not subject to the *Act* is beyond the Administrator's jurisdiction, except insofar as concerns his investigation to determine the jurisdictional question, and the Court of Appeals should have so held. Although in *Mississippi Road Supply Co. v. Walling*, 136 F. (2d) 391, the only precedent cited by the Court of Appeals, it was held that investigations for coverage by and violations of the *Act* might be made concurrently or one at a time, it was there further held (p. 394) that it was within the District Court's discretion to order compliance with the Administrator's subpoena, that a showing had been made before the District Court that appellant was "probably engaged" in interstate commerce, but that it might properly decline to issue the order "if it is made to appear that the investigation is clearly without just authority, as that the person investigated is clearly not under the Act." And in *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, principally relied upon by the Administrator, the product of that company was admittedly transmitted through the mails in interstate commerce. It was there also held (p. 216) that the Administrator "shall not act arbitrarily or in excess of his statutory authority."

Question No. 2.

The Court of Appeals seemingly conceded in its opinion (R. 43), that it had jurisdiction and authority to determine the question of coverage by the *Act*, of petitioner and its employees, and that it might thereby conclude the whole matter in this proceeding, although it refused to exercise

that jurisdiction and authority because of the erroneous conclusion that the Administrator's application for a subpoena duces tecum, and the District Court's order of compliance therewith, for petitioner's payroll records showing hours worked by and wages paid to each of its employees constituted an inquiry concomitantly into the questions both of coverage by and violation of the *Act;* notwithstanding the Administrator had already made a thorough examination respecting the matter of coverage and had determined therefrom that petitioner was subject to the *Act* under the theory advanced by him through his Regional Attorney.

Petitioner avers that under the language and intent of the *Act* it cannot be stretched to fit the Administrator's theory; but even though it presents a debatable point or one which, upon due consideration, should be accepted, it was put at issue in this proceeding and should have been passed upon and decided, rather than ignored as it was, by the District Court and the Court of Appeals.

IMPORTANCE OF QUESTIONS.

The questions here involved are of fundamental importance, not only to petitioner, but to many others in similar circumstances, and it is submitted that judicial sanction of the procedure undertaken by the Administrator will open the door to abuses of serious consequence. He may return, time after time, and subject an employer's records to repeated inspection and examination, without ever instituting a proceeding in the courts in which the issue of coverage by the *Act* may be determined, if such determination herein is denied.

PRAYER.

WHEREFORE, petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, ordering sent to this Court a full transcript of the record and all proceedings in the case entitled: Holloway Gravel Company, Inc., Appellant, vs. William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee, No. 12,584, on the docket of said Court; and finally, that the judgment of the Court of Appeals be reversed and the Administrator's petition for the enforcement of his subpoena duces tecum dismissed at his cost.

Petitioner prays further for such other relief as may be necessary and appropriate.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 183

HOLLOWAY GRAVEL COMPANY, INC., PETITIONER

v.

WILLIAM R. MCCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 33–35) is not officially reported. The opinion of the United States Court of Appeals (R. 42–43) is reported at 174 F. 2d 421.

JURISDICTION

The judgment of the court below was entered on May 19, 1949 (R. 44). A petition for rehearing was denied on June 10, 1949 (R. 51). The petition for certiorari was filed on July 11, 1949.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the district court had power to order compliance with a subpoena duces tecum issued by the Administrator of the Wage and Hour Division, without a prior determination that petitioner is subject to the Fair Labor Standards Act.

STATUTES INVOLVED

The statutory provisions involved are Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, *et seq.*, and Section 9 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 15 U. S. C. 49. These provisions are set forth in the Appendix.

STATEMENT

After petitioner's repeated refusal to permit inspectors of the Wage and Hour Division to examine its wage and hour records for the purpose of determining whether it was violating the Fair Labor Standards Act (R. 4, 9–10, 17, 25, 43), petitioner's president was served with a subpoena duces tecum signed by the Administrator of the Division (R. 4–5, 12). Petitioner had made available and the inspector had examined the records relating to the nature of its business and the distribution of its products, but had refused to permit examination of its payroll and time cards on the ground that it was engaged in an intrastate

business outside the scope of the Act (R. 9, 18, 43). The subpoena called for the production of petitioner's records showing wages paid to and hours worked by the employees for the period from October 27, 1945, to the date of the subpoena (R. 12–13).

Following petitioner's refusal to comply with the subpoena (R. 5–6, 11, 17), the Administrator on July 12, 1948 applied to the district court for an enforcement order (R. 2–7). The application alleged, on information and belief, that respondent was engaged "in the production of sand and gravel for interstate commerce, and that some or all of its employees may be entitled to the benefits of the Fair Labor Standards Act." (R. 3.) It further alleged that the records requested were "relative, material and appropriate to determine whether * * * [petitioner] has violated * * * the Act and will aid in the enforcement of the provisions of the Act" (R. 6). In response to the order to show cause (R. 13–14), petitioner contended that its payroll and time records need not be produced because neither the industry in which it is engaged nor its employees are engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act and petitioner "was not, therefore, required to operate in compliance therewith" (R. 24).

The district court, after finding that "this investigation * * * is for a lawfully author-

ized purpose, within the power of Congress to command, and the documents sought are relevant to the inquiry," issued an order requiring petitioner to comply with the subpoena (R. 34). The Court of Appeals affirmed, ruling that the Administrator has the right "to inquire concomitantly into these concomitant questions" of coverage and violations, and concluded that "in the absence of a clear showing of unreasonableness or gross abuse of the administrative function * * * the Courts will not obstruct or interfere with such an investigation merely in order to render an anticipatory judgment on the merits" (R. 43).

ARGUMENT

Petitioner presents no issue not already determined by this Court in *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186, and *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501; see also *Fleming* v. *Montgomery Ward & Co.,* 114 F. 2d 384 (C. A. 7), certiorari denied, 311 U. S. 690; *Walling* v. *Standard Dredging Corp.,* 132 F. 2d 322 (C. A. 2), certiorari denied, 319 U. S. 761; *Mississippi Road Supply Co.* v. *Walling,* 136 F. 2d 391 (C. A. 5), certiorari denied, 320 U. S. 752; *Walling* v. *Benson,* 137 F. 2d 501 (C. A. 8), certiorari denied, 320 U. S. 791; *Detweiler Bros.* v. *Walling,* 157 F. 2d 841 (C. A. 9), certiorari denied, 330 U. S. 819. These decisions approved judicial enforcement of subpoenas substantially identical to that here

involved, overruling substantially identical objections. Compare 327 U. S. at 210, n. 46, setting forth the text of one of the subpoenas then before this Court. See also *Graylyn Bainbridge Corporation* v. *Woods,* 173 F. 2d 790 (C. A. 8), certiorari denied June 27, 1949, holding that even in the absence of the explicit statutory investigative authority such as is conferred on the Administrator by the Fair Labor Standards Act, the Housing Expediter was authorized, pursuant to regulations issued under the Emergency Price Control Act of 1947, as amended (Pub. Law 464, 80th Cong., 2d Sess., Section 204 (d)) to conduct an investigation of a housing unit in a defense rental area without prior judicial determination that the housing unit was a "controlled" housing accommodation within the scope of regulations under the Housing and Rent Act of 1947.

Petitioner cites no judicial authority to the contrary but urges that such procedure "will open the door to abuses of serious consequence" if a judicial determination of coverage is not had at the preliminary investigative stage (Pet. 11). But the very point of this Court's decisions is that the administrative investigation of "violations" as well as of "coverage" may and should be completed without piecemeal litigation, and that the coverage issue in the first instance is properly left to the Administrator's determination—at least until the investigation has been completed.

CONCLUSION

The decision of the court below is clearly correct. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1949.

APPENDIX

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 209, 211:

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Admin-

istrator shall bring all actions under section 17 to restrain violations of this Act.

Federal Trade Commission Act, 38 Stat. 717 (15 U. S. C. 49):

SEC. 9.

* * * * *

* * * in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

U. S. GOVERNMENT PRINTING OFFICE: 1949